

TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 341

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WILLIAM H. McALISTER, APPELLANT,

VS.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

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FILED JULY 15, 1906.

(19,843.)

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1 To the circuit court of the United States in and for the southern district of New York, in the second judicial circuit:

The petition of William H. McAlister respectfully shows:

I. That your petitioner is a citizen of the United States, an inhabitant and citizen of the State of New York, and a resident of the city of New York, in this circuit and district.

II. That your petitioner is now, and for some time past has been a director, and the secretary of the American Tobacco Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

III. That your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States, in the custody of William Henkel, Esquire, United States marshal in and for the southern district of New York, to wit, at the borough of Manhattan, of the city of New York, in the said district.

IV. That the sole claim or authority by virtue of which the said William Henkel, marshal as aforesaid, so restrains and detains your petitioner, is a certain commitment in writing, a copy of which is hereto annexed marked "A."

V. That the said commitment was issued pursuant to an order of this court made and entered at a stated term thereof held at the post office building in the city of New York on the 14th day of June, 1905, a copy of which said order is hereto annexed marked "B."

2 VI. That the said last mentioned order was made and based solely and exclusively, upon two certain presentments or reports presented to and filed in this court by the grand jury of the United States for the southern district of New York, on the 14th day June, 1905, copies of which said presentments or reports (which are referred to and described in the said last mentioned order as "charges of contempt") are hereto annexed, marked "C" and "D," respectively.

VII. That your petitioner's imprisonment, restraint and detention are without authority of law whatsoever, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

(a.) This court was without jurisdiction under the said Constitution and laws, by reason of any of the matters or things contained and set forth in the said presentments or reports of the grand jury, or either of them, to entertain any charge or charges of contempt against your petitioner, or to act or proceed in any manner in the premises.

(b.) As appears from the said presentments or reports, at the time your petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was no cause or proceeding depending

in this court or before the grand jury between the United States of America and the American Tobacco Company and the Imperial Tobacco Company, (of Great Britain and Ireland), Limited, defendants, in which your petitioner could be required under the said Constitution and laws, to testify or give evidence before the grand jury.

3 (c.) As appears from the said presentments or reports the grand jury was not in the exercise of its proper and legitimate authority in prosecuting the so-called "suit or proceeding" so described therein, the powers of a Federal grand jury being limited under the Constitution to the investigation of specific charges against particular persons, duly laid before them, and based upon definite allegations, and there being before the grand jury at the time your petitioner attended before them no bill of indictment, nor any specific charge or charges against any particular person, except that originated by the oral statement of the attorney for the Government as appears from the said reports or presentments; consequently its requirement that your petitioner should testify and produce documentary evidence, and the orders of the court based thereon, were *coram non judice* and void.

(d.) Section 1 of the legislative, executive and judicial appropriation act for the fiscal year ending June 30, 1904, approved February 25, 1903, does not give your petitioner immunity from prosecution, for or on account of transactions, matters or things concerning which he was directed to testify and produce evidence before the grand jury, the investigation herein before that body upon which he was required to testify and produce said papers and documents not being a proceeding, suit or prosecution under either of the acts referred to in the act of February 25, 1903; consequently your petitioner was privileged under the Constitution and laws of the United States, and particularly by the 5th amendment to the said Constitution, to refuse to testify or produce evidence before the grand jury upon the said investigation, when by so doing he might criminate himself, as he avers, he might have, had he given the testimony or produced the papers and documents as required by the grand jury and the court.

4 (e.) The order of the court directing your petitioner to testify and produce evidence before the grand jury was, in effect, an attempt to compel the American Tobacco Company to be a witness against itself in a criminal case in violation of the said 5th amendment, the so-called "suit or proceeding" before the grand jury being directed against that company and another, and the sole motive of examining your petitioner being the fact that his evidence of matters within his knowledge solely by reason of his official relations toward that company might tend to furnish evidence against it.

(f.) The privilege of the American Tobacco Company secured to it by the said 5th amendment against being compelled to be a witness against itself in a criminal case would have been violated by the compulsory examination of your petitioner in respect to the

matters concerning which he was directed to testify and give evidence before the grand jury.

(g.) The said act of February 25, 1903, is unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things constituting violations of the laws of the United States, on condition that they will, when so required, testify and produce evidence, documentary or otherwise, concerning such violations in proceedings, suits or prosecutions under the three statutes mentioned therein, thus usurping and infringing upon the pardoning power exclusively vested in the President by the express terms of section 2, of article II of the Constitution of the United States, and which is not subject to legislative control; consequently the said act does not operate to deprive  
5 your petitioner of his right under the constitutional provision above mentioned to refuse to criminate himself.

(h.) The said act of February 25, 1903, is also unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, provided such persons testify or produce evidence, documentary or otherwise, concerning such transactions, matters and things, in proceedings, suits or prosecutions under the three acts before mentioned, thus infringing upon and setting at naught the express provisions of article X of the amendments to the Constitution of the United States that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, of which the right to prosecute and punish offenders against their own peace and dignity is one, are reserved to the States, respectively, or to the people.

(i.) The said act of February 25, 1903, is further unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things, notwithstanding such transactions, matters or things may constitute violations of the laws of the various States, provided such persons testify and produce evidence, documentary or otherwise, concerning such transactions, matters or things in proceedings, suits or prosecutions under the statutes therein mentioned, thus usurping the power expressly reserved to the States by article X of the amendments to the Constitution of the United States to grant or withhold pardons, and to provide for and deal with the granting or withholding thereof, in accordance with their own constitutions and laws.

6 (j.) The said act of February 25, 1903, contains no requirement that a person shall testify or produce evidence in proceedings, suits or prosecutions under the three acts notwithstanding such testimony or production may tend to criminate him; therefore its only effect is to render testimony incompetent as evidence when the person giving it has voluntarily waived his constitutional privilege, whereas before the passage of the act such testimony could have been used against the person giving it.

(k.) The court's order directing your petitioner forthwith to produce the papers called for by the *subpoena duces tecum* was made in violation of your petitioner's rights under the fourth amendment to the Constitution of the United States providing that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.

(l.) The papers mentioned in the said *subpoena duces tecum* being the property of the American Tobacco Company and in your petitioner's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produce such papers thereunder would, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation, in violation of its rights under the said fourth amendment, which it was in your petitioner's duty as such officer and custodian to protect by lawful means, as he is now doing.

(m.) The production of the said papers described in the *subpoena duces tecum* being required of your petitioner in his capacity of officer and director of the said corporation, and the said subpoena not being issued upon probable cause, or supported by oath or affirmation, its issuance constituted a violation of the said fourth amendment; consequently, not only was your petitioner under no legal obligation to obey the same, but his duty as such officer and director required him to disobey it.

VIII. Your petitioner is advised by counsel and verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order to the custody of the marshal were without legal right, authority or jurisdiction of any kind, and are utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder.

Wherefore your petitioner prays that a writ of *habeas corpus* may issue directed to the said William Henkel, Esquire, marshal, as aforesaid, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

Dated at the city of New York the 14th day of June, 1905.

WILLIAM H. McALISTER,  
NICOLL, ANABLE & LINDSAY,  
Attorneys for the Petitioner.

Office and post-office address, 31 Nassau street, Manhattan, New York, N. Y.



8 UNITED STATES OF AMERICA,  
Southern District of New York, } ss :

William H. McAlister, being duly sworn deposes and says that he is the petitioner above named ; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WILLIAM H. McALISTER.

Sworn to before me this 14th day of June, 1905.

JOHN A. SHIELDS,  
U. S. Commissioner.

9 "A."

Circuit Court of the United States, Southern District of New York.

In the Matter of WILLIAM H. McALISTER, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness William H. McAlister, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court, upon the 14th day of June, 1905, and the said witness, on that day, appearing in person in open court, and having been ordered by the court to answer the said questions and produce the said papers and documents ; and further charges of contempt having been presented by the said grand jury, on the 14th day of June, 1905, showing that, after the making of the said order by the court on June 14th, 1905, the said witness appeared before the said grand jury and again refused to answer the said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, both of which charges were filed herein on the 14th day of June, 1905 ; and the said William H. McAlister having again appeared in person, in open court on the said 14th day of June, 1905, and been heard, and an order having, thereupon, been made, in writing, by this court, on the 14th day of June, 1905, wherein it was considered, ordered and adjudged by this court that the said William H. McAlister be adjudged to have committed the contempt alleged, and that he be fined the sum of five dollars, and that he be committed to the custody of the marshal until he complies with the aforesaid order of the court, by answering the said questions and producing the said papers and documents, or be discharged by due process of law ;

This therefore is to command the United States marshal, for the southern district of New York, to take and receive the said William H. McAlister into his custody, in pursuance of the aforesaid order, and to detain him until he be legally discharged.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourteenth day of June, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

JOHN A. SHIELDS,  
Clerk of the Circuit Court of the United States of  
America for the Southern District of  
New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,  
U. S. C. Judge.

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"B."

At a stated term of the circuit court of the United States, held at the post office building, in the city of New York, on the 14th day of June, 1905.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of WILLIAM H. MCALISTER, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness William H. McAlister, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court, upon the 14th day of June, 1905, and the said witness, on that day, appearing in person in open court, and having been ordered by the court to answer the said questions and produce the said papers and documents; and further charges of contempt having been presented by the said grand jury, on the 14th day of June, 1905, showing that, after the making of the said order of June 14th, 1905, the said witness appeared before the said grand jury and again refused to answer the said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, both of which charges were filed herein on the 14th day of June, 1905; and the said William H. McAlister having again appeared in person, in open court, on the said 14th day of June, 1905, and been heard, it

12 is now

Considered, ordered and adjudged by the court that the said William H. McAlister be, and he is hereby, adjudged to have committed the contempt alleged as aforesaid; that he be, and he hereby is, fined the sum of five dollars, and that he be committed



to the custody of the marshal, until he complies with the aforesaid order of the court, by answering the said questions and producing the said papers and documents, or is discharged by due process of law.

E. HENRY LACOMBE, U. S. C. J.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—In the matter of William H. McAlister, a witness charged with contempt by the grand jury, circuit court of the United States, for the southern district of New York.—Order for commitment.—U. S. circuit court, southern district New York, Filed Jun- 14, 1905, John A. Shields, clerk.

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"C."

NEW YORK CITY, N. Y., June 14th, 1905.

To the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York.

SIR: The grand jury for the May term, 1905, respectfully represents to your honor, and charges, that William H. McAlister is guilty of contempt of court, in this, to wit: That upon the 13th day of June, 1905, a subpoena, in due form, was personally served upon the said William H. McAlister, commanding him to appear before the said grand jury, at a certain time named in the said subpoena, to-wit, on the 14th day of June, 1905 (a copy of which subpoena is hereto annexed, marked "Exhibit A"), to testify and give evidence in relation to a certain complaint or charge then under investigation before the said grand jury, and to produce, at the said time and place, certain papers and documents, all of which are specifically enumerated and set forth in the said subpoena, to which reference is hereby made, and which is hereby made a part hereof.

That prior to the service of the said subpoena, and on the said 13th day of June, 1905, Mr. Henry W. Taft, an assistant to the United States attorney for the southern district of New York, who was then in attendance before the said grand jury, duly made and presented to it a complaint and charge, in behalf of the United States

14 of America, against the American Tobacco Company, a corporation organized under the laws of New Jersey, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been guilty of a violation of the so-called "Sherman" or "Anti-trust" act, being "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Statutes, 209, 1 Supp. Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and chapter 735 of the Laws of 1903, approved February 25th, 1903, in the following particulars, to wit:

(1.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland) Limited, entered into, and have ever since been engaged, within the southern district of New York and throughout the United States, in carrying out the terms of a contract in restraint of trade and commerce among the several States of the United States in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(2.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, entered into, and have

15 ever since been engaged, within the southern district of New York and throughout the United States, in carrying out the terms of, a contract in restraint of trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(3.) In that on or about the 27th day of September, 1902, and continuously since that day, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged, within the southern district of New York and throughout the United States, in an attempt to monopolize the trade and commerce, among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes,

(4.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, did combine and conspire, and ever since that day within the southern district of New York and throughout the United States they have combined and conspired, and have been engaged in carrying out a combination and conspiracy, with each other and with other persons and corporations, to monopolize the trade and commerce among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(5.) In that ever since on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged within the southern district of New York and throughout the United States, in an attempt to monopolize, and have, also, during said time and in said places, combined and conspired and have been engaged in carrying out a combination and conspiracy with each other and with other persons and corporations to monopolize the trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

17 That the said assistant district attorney acted for the said grand jury and at its request in the investigation of said charges.

That on said 14th day of June, 1905, the said William H. McAlister appeared before the said grand jury, in obedience to the said subpoena, but failed and refused, and still fails and refuses, to produce before the said grand jury, the papers and documents called for in the said subpoena. That the said documents, and each of them, are material to the investigation being conducted by the said grand jury of the charge and complaint submitted to it as aforesaid.

That the said William H. McAlister did further, on the said 14th day of June, 1905, fail and refuse, and still fails and refuses, to answer certain questions which were propounded to the said William H. McAlister before the said grand jury, by the said Henry W. Taft, as assistant to the United States attorney for the southern district of New York; that hereto annexed marked "Exhibit B," is a true and correct copy of the questions so propounded to the said William H. McAlister and a true and correct copy of the answers and refusals to answer, respectively, made by the said William H. McAlister to the said questions, and the reasons given by him for such refusals, which said Exhibit B is hereby made a part of this presentment.

That upon the appearance of the said witness before the said grand jury, on the said 14th day of June, 1905, and before any questions were propounded to the said witness, the said witness was duly advised by the said assistant United States attorney, in the hearing and presence of the said grand jury, and by the direction of the said grand jury, that the suit or the proceeding then pending before the said grand jury was a suit or proceeding upon a complaint and charge under the so-called "Sherman act," being "An act to protect trade and commerce against unlawful restraints and monopolies," and he was then and there further advised that, under chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence in any proceeding, suit or prosecution under the said "Sherman act," under which the aforesaid proceeding was brought; provided, however, that no person so testifying shall be exempted from prosecution, or punishment, for perjury committed in so testifying; and the said William H. McAlister was then and there further advised, by the said Henry W. Taft, as assistant to the United States attorney for the southern district of New York, and in behalf of the said grand jury, as follows:

"And I also advise you that it is the purpose of the United States Government not to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you may testify to, or on account of any evidence, documentary or otherwise, which you may

"produce in this proceeding, and that I offer you, and assure you, immunity and exemption for any such evidence, either documentary or otherwise, that you may give."

19 That each of the questions propounded to said witness, as aforesaid, and enumerated in the schedule annexed hereto and marked "Exhibit B," was pertinent to the said complaint and charge then pending before the said grand jury and was material thereto.

Wherefore, the said grand jury charges that the said William H. McAlister is in contempt of court, and asks that such proceedings may be had herein as are, in the premises, in accordance with law.

GEORGE E. WOOD, Foreman.

"EXHIBIT A."

The President of the United States to William H. McAlister, 111 Fifth avenue, New York city, N. Y., Greeting :

We command you that, all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America, for the southern district of New York, at a circuit court, to be held in the United States court and New York post office building, in the borough of Manhattan, city of New York, in and for the said southern district of New York, on the fourteenth day of June, 1905, at 10.30 o'clock in the forenoon, to testify and give evidence in a certain suit or proceeding now pending undetermined in the circuit court of the United States, for the southern district of New York, before the grand jury thereof, between The United States of America, as complainant, and The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States of America; and that you bring with you and produce, at the time and place aforesaid :

(1.) An agreement, bearing date September 27th, 1902, between Ogden's, Limited, of the first part; the American Tobacco Company, of the second part; the Continental Tobacco Company, of the third part; American Cigar Company, of the fourth part; Consolidated Tobacco Company, of the fifth part; British Tobacco Company, Limited, of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the seventh part; a copy, or a duplicate original, of the said agreement being on file or recorded in the companies' registration office, in London, England.

(2.) An agreement providing for the transfer, to a separate company, of the export business from the United Kingdom (except to the United States) not only of Ogden's, Limited, but also of the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and of Salmon & Gluckstein, Limited, and the export business, from the

United States, of the American Tobacco Company, the Continental Tobacco Company and the American Cigar Company (except to the United Kingdom), which agreement is referred to in the said last-mentioned agreement of September 27th, 1902, as having been then already prepared and executed contemporaneously therewith.

(3.) An agreement, dated September 27th, 1902, between the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part; Ogden's, Limited, of the second part; the American Tobacco Company, of the third part; the Continental Tobacco Company, of the fourth part; American Cigar Company, of the fifth part; Consolidated Tobacco Company, of the sixth part; and Williamson Whitehead Fuller and James Inskip, of the seventh part.

22 And for a failure to attend, and produce the above mentioned papers, you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved and forfeit two hundred and fifty dollars, in addition thereto.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, the 13th day of June, one thousand nine hundred and five.

[SEAL.]

(S'd)

JOHN A. SHIELDS, Clerk.

HENRY L. BURNETT,

United States Attorney for the  
Southern District of New York.

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# EXHIBIT B.

Before the United States Grand Jury.

THE UNITED STATES OF AMERICA, Complainant,

*against*

THE AMERICAN TOBACCO COMPANY and THE IMPERIAL TOBACCO  
Company (of Great Britain and Ireland), Limited, Defendants. }

New York, June 14th, 1905.

## Appearances.

Henry W. Taft, Esq., assistant United States attorney.

Felix H. Levy, Esq., assistant United States attorney.

WILLIAM H. McALISTER, being duly sworn, testified as follows :

By the WITNESS: Before being sworn, I respectfully ask to be advised what the "suit or proceeding" is which is thus described in the subpoena under which I have been summoned before this body, the nature or purpose of this "suit or proceeding," and the specific charge against the defendants, if any has been made, in

order that I may learn whether or not the grand jury has any lawful right or authority to examine me as a witness; and I also ask that I be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which the grand jury acted, in order that I may know concerning what transactions, matters or things I am called upon to testify or produce evidence.

By Mr. TAFT: Mr. McAlister, this is a suit or proceeding now pending before the grand jury, upon a complaint and charge made, in behalf of the United States of America, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britian and Ireland), Limited, under the so-called "Sherman act," being "An act to protect trade and commerce against unlawful restraints and monopolies." Under chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said "Sherman act," under which this suit or proceedings is brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose of the United States Government not to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you may testify to, or on account of any evidence, documentary or otherwise, which you may produce in this proceeding, and that I offer you, and assure you, immunity and exemption for any such evidence, either documentary or otherwise, that you may give.

By the WITNESS: I now ask for an opportunity to consult counsel, before being sworn, or subjected to any examination, and I protest against being sworn, on the ground that there is no legal warrant or authority for my examination as a witness before this body.

By Mr. TAFT:

Q. Where do you reside and what is your occupation?

A. No. 2 West 88th St. New York city. I am secretary and a director of the American Tobacco Company.

Q. What business is the American Tobacco Company engaged in?

A. I respectfully decline to answer any further questions, on the ground, first: that there is no legal warrant or authority for my examination; second, that my answers may tend to criminate me; and, third, that my answers may tend to furnish evidence against the American Tobacco Company, of which I am secretary, and which is one of the defendants against which this investigation is directed, and that the Government, in this manner, is attempting to compel the American Tobacco Company to be a witness against itself in a criminal case.

Q. Where is the main office of the American Tobacco Company?



A. I decline to answer, for the same reasons.

Q. Where is its office in the city of New York?

A. I decline to answer, for the same reasons.

Q. Who are the officers of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Are you not the secretary of the American Tobacco Company?

A. Yes.

26 Q. Have you brought with you the subpoena in pursuance of which you have appeared before this grand jury?

A. No.

Q. I show you a paper purporting to be a copy of a subpoena (showing witness a paper which was marked "Exhibit A"); is that a copy of the subpoena which was served upon you, and in pursuance of which you have appeared here to-day?

A. Yes.

Q. Have you produced the papers which are called for in that subpoena, or any of them?

A. I have not, because, as I am advised by counsel, I am under no legal obligation to do so; second, because they may tend to criminate me; and, third, because they are not my property, but that of the American Tobacco Company; and are in my custody solely by reason of my official relations toward that company. Under these circumstances, my counsel advise me that the compulsion of the subpoena would, if effective, amount to an unreasonable search for, and seizure of, the company's papers and effects, in violation of its rights under the constitution, which it is my duty to protect by all lawful means, as I am now doing. I am further advised by my counsel that the subpoena which is, in effect, a warrant to search for, and seize, the papers in question was not issued upon probable cause, or supported by oath or affirmation, and is, for that reason, utterly null and void.

Q. Have you brought any of the papers or documents specified in that subpoena *duces tecum* with you to-day?

A. I have not for the reasons I have already given.

27 Q. I ask you now, in behalf of the grand jury, that you produce all of the papers and documents specified in the subpoena.

A. I decline for the same reasons to do so.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco products, cigars and cigarettes, between this country and Great Britain, and any of its colonies?

A. I decline to answer that for the same reasons given above.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland) Limited, in connection with the trade in to-

bacco, tobacco products, cigars and cigarettes, between the several States of the United States?

A. I decline to answer that for the same reasons.

Q. Were you present, in England, when an agreement, in writing, dated September 27th, 1902, was executed, between Ogden's Limited, the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, British Tobacco Company, Limited, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, on or about the day of its date?

A. I decline to answer that for the same reasons.

Q. Is the paper which I now show you, (showing witness a paper, marked "Exhibit C"), a copy of the agreement which was then executed?

A. I decline to answer that for the same reasons.

28 (Paper marked "Exhibit C" is hereto annexed.)

Q. Is Exhibit C, now shown you, a copy of one of the papers, or documents, which you are required by the *subpoena duces tecum*, above referred to, to produce before this grand jury?

A. I decline to answer that for the same reasons.

Q. Is there an agreement, of which Exhibit C is a copy, now in force?

A. I decline to answer that for the same reasons.

An agreement made the twenty seventh day of September, one thousand nine hundred and two, between Ogden's Limited, being a company duly incorporated under English law (hereinafter referred to as the "Ogden Company"), of the first part; the American Tobacco Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, one of the States of the United States of America, (hereinafter referred to as the "American Company") of the second part; Continental Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey, (hereinafter referred to as the "Continental Company") of the third part; American Cigar Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "cigar company") of the fourth part; Consolidated Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Consolidated Company") of the fifth part; British Tobacco Company, Limited, being a company incorporated under English law (hereinafter referred to as the "British Company") of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland,)

Limited, a corporation incorporated under English law (hereinafter referred to as the "Imperial Company") of the seventh part :

30 Whereas, the Ogden Company was incorporated to acquire and purchase from Thomas Ogden, Limited, the right of carrying on, as successor to that company, the business carried on as importers of, and dealers in, tobacco and cigars; manufacturers of, and dealers in, cigars, cigarettes and snuff, and other businesses; and (amongst other objects) to sell the business or undertaking of the Ogden Company, or any part thereof, for such consideration as the company might think fit; and, in particular, for shares, debentures or securities of any other company having objects altogether, or, in part, similar, to those of the Ogden Company; and, by the articles of association of the Ogden Company, it is provided (amongst other things) that the directors may sell the business or undertaking of the Ogden Company, or any part thereof, and may accept payment for the said business or undertaking, or for any property or rights sold, either in cash, or in shares or bonds, of any company, with or without deferred or preferred rights, or partly in one mode and partly in another, and generally on such terms as the directors may determine; and, further, that the directors may do all or any of the things or matters mentioned in the memorandum of association. And whereas, the American Company is entitled to nearly the whole of the shares of the Ogden Company, and the British Company has been formed and incorporated in the interest of the Ogden Company, and all the shares issued by the British Company are held by parties interested in the Ogden Company; and,

31 Whereas, the Imperial Company has been incorporated for the purpose (amongst other things) of carrying on the business of tobacco manufacturers, planters, growers, exporters, importers and merchants, and general dealing in tobacco, cigars, cigarettes, snuff, tobacco machinery, and other articles and things, and to purchase, or otherwise acquire and undertake, all, or any part of, the business property and liabilities of any company carrying on any business which the Imperial Company is authorized to carry on; and, by the articles of association of the Imperial Company, the directors, in addition to all powers and authorities expressly conferred upon them, are authorized to exercise all of such powers, and to do all of such acts and things as may be exercised or done by the company, and are not directed or required to be exercised or done in general meeting, and to enter into all such negotiations and contracts, and execute and do all such acts, deeds and things, in the name and on behalf of the company, as they may consider expedient for or in relation to purposes of the company; and,

Whereas, proposals have been made for amalgamating the business of the Ogden Company with that of the Imperial Company, by transfer of the business and undertaking of the Ogden Company, and of the British Company, to the Imperial Company, upon the

terms and conditions, and subject to and with the stipulations hereinafter contained or referred to.

Now, therefore, it is hereby agreed as follows, namely:—

32 (1.) The Ogden Company shall sell, and the Imperial Company shall purchase, as from the 30th day of September, 1902 (hereinafter referred to as the "transfer day") the undertaking of the Ogden Company, which expression shall be deemed to include all the lands, buildings, hereditaments, goods, chattels, stock or shares in companies, good will, formulas and recipes for the preparation, treatment, and manufacture of tobacco, patent rights, trade marks, brands, licenses, and other exclusive rights and privileges, things in action, contracts, agreements, securities, and other assets whatsoever and wheresoever belonging to the Ogden Company, except the cash in hand and at the bank, and the book and other debts belonging or owing to the Ogden Company, on the transfer day, and except, also, the export business, and the good will and trade marks of such export business of the Ogden Company, and the lands, buildings and hereditaments, goods, chattels and other effects occupied or used, or acquired for the purposes of such export business, and except, also, all funds set apart for the purpose of redeeming coupons of the Ogden Company, and the goods required for the like purpose.

(2.) The price to be paid to the Ogden Company, and for its nominees, shall be a sum equal to the aggregate of the following items, that is to say:

(a.) The value of the lands, buildings and hereditaments agreed to be sold by the Ogden Company, as the same now stand in the books of the company;

33 (b.) The value of the fixed and loose plant, live stock machinery, tools and utensils, as the same now stand in the books of the company;

(c.) The value of the stock in trade and materials at cost;

(d.) The value of the good will of the business of the Ogden Company, which is to include all patent rights, trade marks, brands, licenses, and other exclusive rights and privileges, and all the shares in the British Company, taken at the sum of one million five hundred thousand pounds (£1,500,000) payable as hereinafter provided.

The consideration for the sale aforesaid shall be satisfied as follows, that is to say:

(a.) As to the amount payable for good will, and other rights connected therewith, as hereinbefore defined under (d) in clause 2, by the allotment to the Ogden Company, or its nominees, of fully paid up ordinary shares in the Imperial Company (and consisting, as to one half, of preferred ordinary shares, and, as to the other half, of deferred ordinary shares) to be treated as of par value;

(b.) As to one equal one-third part of the balance, by the allotment to the Ogden Company, or its nominees, of fully paid up pref-

erence shares in the Imperial Company, to be treated as of par value;

(c.) As to another equal third part of the said balance, by the allotment to the Ogden Company, or its nominees, of debenture stock of the Imperial Company, to be treated as of par, value;

(d.) As to the residue, by the payment thereof in cash to the Ogden Company;

Provided, that, if one-third part of the said balance shall exceed £300,000, the Imperial Company shall not be required to satisfy more than that amount by the allotment of preference shares, and the excess of such one-third part beyond £300,000 shall be added to the debenture stock and cash prescribed by (c) and (d), in equal parts.

(4.) The Ogden Company shall clear its undertaking of all mortgages, charges and other incumbrances, and shall pay and discharge all its own debts and liabilities, and shall be entitled to receive the proceeds of all book debts due to it at the transfer day, but, for a period of three calendar months after the transfer day, the Imperial Company shall be authorized, on behalf of the Ogden Company, to collect and receive such book debts, and the proceeds shall be, from time to time, paid over to the Ogden Company, or its nominees at the end of every month.

(5.) The Imperial Company, shall, as from the transfer day, undertake the observance and performance of all covenants and conditions on the part of the lessee or tenant, in any lease of, or agreement relating to, lands, buildings and hereditaments hereby agreed to be sold, and thenceforth, on the part of the lessee or tenant to be observed and performed, and the Imperial Company shall also, as from the same date (except as in this clause hereinafter provided) undertake the performance of all contracts *bona fide* entered into by the Ogden Company, in the ordinary course of carrying on its business (other than contracts of employment with the present directors, or any of them) and shall indemnify the Ogden Company against all proceedings, claims and demands in respect thereof, provided always that the Imperial Company does not, by the foregoing stipulations of this clause, undertake any liability in connection with the customer's bonus, or the coupons or presents scheme of the Ogden Company.

(6.) All books of account of the Ogden Company, and all books of reference to customers, and other books and documents of the Ogden Company, except the statutory and minute books, and any other books of a private nature, shall be delivered to the Imperial Company, upon completion of the purchase, and the Imperial Company shall thenceforth be entitled to the custody thereof, and to the use thereof, for the purpose of carrying on its business; but, nevertheless, the Ogden Company, or its agents, shall have free access, at all reasonable times, to the said books and documents, or any of them, for any reasonable purpose, and to the temporary use of the same for the purpose of any legal proceedings.

(7.) The Imperial Company shall, from the time of any property being at its risk, be entitled to the benefit of all current insurances, and the Ogden Company shall be entitled to re-payment of a proportionate part of the premiums already paid for the unexpired portion of the current year, of any policy, and all periodical payments shall be apportioned as on the 30th of September, 1902.

(8.) The purchase shall be completed on or before the 1st day of November, 1902, at the office of Messrs. Grace, Smith & Hood, 41 Castle street, Liverpool, the solicitors for the Ogden Company, and the consideration for same shall be paid or satisfied pursuant to the provisions of this agreement, and thereupon, and from time to time, the Ogden Company shall execute and do all such assurances and things for vesting the said premises in the Imperial Company, and giving to it the full benefit of this agreement, as shall be reasonably required.

(9.) The Imperial Company shall pay interest at the rate of five (5) per cent. per annum on the portion of the purchase money payable to the Ogden Company in cash, from the transfer day until actual payment, and on the portions payable in debenture stock and preference stock, from the transfer day until the actual issue of such stock and shares respectively, and the Imperial Company shall pay interest on the portion of the said consideration, payable in ordinary shares, for the period from the transfer day until the actual issue of such shares, at the same rate per annum as shall be paid by way of dividend upon the ordinary shares of the same class in the Imperial Company, already issued, for the period comprising such interval.

(10.) As regards any of the premises subject to mortgages which cannot be paid off until after the time of completion, the Ogden Company shall, if so desired by the Imperial Company, convey the said premises, subject to the mortgages affecting the same respectively, and the Imperial Company shall retain, out of the cash portion of the consideration aforesaid, a sum sufficient to pay off and satisfy the claims under such mortgages.

(11.) In any and every case where any leaseholds hereby agreed to be sold are only assignable with the consent of the landlords from whom the same, respectively, are held, the Ogden Company shall use its best endeavors to obtain the requisite consents for the assignment thereof to the Imperial Company, and, in any case, where such consents cannot conveniently be obtained, the Ogden Company shall execute a declaration of trust, in favor of the Imperial Company, or otherwise deal with the same, as the Imperial Company shall direct.

(12.) The possession of the property hereby agreed to be sold, shall be delivered by the Ogden Company to the Imperial Company on the transfer day, and, in the meantime, the Ogden Company shall carry on its business and maintain the same as a going concern.

(13.) For the purposes of title and conveyance of the lands, buildings and hereditaments, the Ogden Company, and the Imperial Company, shall, respectively, be deemed and taken to have entered



into this contract subject to the terms and stipulations of the Liverpool public sale conditions, so far as the same shall be applicable to a sale by private contract.

38 (14.) Each of the parties hereto of the first six parts, for itself, and not the one for any others, agrees, and shall covenant with the Imperial Company, that the covenanting party will not, at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on, or be employed, engaged, or concerned or interested in the business, in the United Kingdom, of a tobacco manufacturer, or in any dealing in tobacco, or its products therein, or sanction the use of its name in connection with any such business therein, save so far as the covenanting company shall, as a member of the Imperial Company, or as a member of any company manufacturing cigars in the United States, or of any other companies formed, or to be formed, with the concurrence of the Imperial Company, be interested in the business thereof, or through, or in connection with the Imperial Company, as hereinafter provided. The said covenanting parties will procure the following directors, or some one of them, namely, James Buchanan Duke, Benjamin Newton Duke, Thomas Fortune Ryan, John Blackwell Cobb, Williamson Whitehead Fuller, William Rees Harris, Percival Smith Hill and Caleb Cushing Dula, and will respectively use their best endeavors to procure such other directors as shall be required by the Imperial Company to enter into a covenant with the Imperial Company similar to that referred to in the preceding part of this clause.

39 (15.) The Imperial Company similarly agrees, and shall covenant with the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, that the Imperial Company will not, at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on, or be employed, engaged, concerned or interested in the business, in the United States, of a tobacco manufacturer, or in any dealing in tobacco, or its products therein, or sanction the use of its name in connection with any such business therein, save so far as the Imperial Company shall, as a member of any other company formed, or to be formed, with the concurrence of the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, be interested in the business thereof, and save and except that the Imperial Company shall be at liberty to buy and treat tobacco leaf and other materials in the United States, for the purpose of its business, and save and except such business as shall be carried on through, or in connection with, the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, as hereinafter provided, the Imperial Company will procure the following of its directors, viz., Sir William Henry Wills, Henry Overton Wills, Sir Edward Payson Wills,

Sir Frederick Wills, George Alfred Wills, Henry Herbert Wills, Walter Melville Wills, Charles Edward Lambert, John Dane Player, Walter Butler, William Goodacre Player and William Rud-  
 40 dell Clarke, and will use its best endeavors to procure such other of its directors as shall be required by the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, to enter into a covenant similar to that referred to in the preceding part of this clause.

(16.) Forthwith, or as soon as may be after the transfer day, the Imperial Company shall duly appoint to its board, three (3) directors, nominated by the Ogden Company, subject to their acquiring the necessary qualifications, and the directors so appointed shall be re-elected, at the next ordinary general meeting, and shall be classified so that only a due proportion of them shall retire in each year.

(17.) The export business of the Ogden Company, hereinbefore excluded from the operation of this contract, is to be the subject of an agreement entered into contemporaneously with this agreement, and providing for the transfer, to a separate company, of the export business from the United Kingdom (except to the United States) not only of the Ogden Company, but also of the Imperial Company, and of Salmon & Gluckstein, Limited, and the export business from the United States of the American Company, the Consolidated Company, and the Cigar Company (except to the United Kingdom) which agreement has already been prepared and is executed contemporaneously with this agreement. For the purpose of construing this agreement, the export business of the said several companies  
 shall be deemed to be herein defined in the same manner as  
 41 in the said contemporaneous agreement. The "United Kingdom" and the "United States" are also, respectively to be deemed to be defined as defined in the same agreement.

(18.) From and after the date of transfer, subject to agreements already existing between the Imperial Company, and its present agents, neither the Imperial Company, nor Salmon & Gluckstein, Limited, shall sell or consign any tobacco products to any person, firm or company within the United States, except the American Company, or persons or companies designated by it; and, on the other hand, the American Company, the Continental Company, and the Cigar Company, and the Consolidated Company, respectively, shall not sell or consign any tobacco products to any person, firm or company in the United Kingdom, except the Imperial Company, or any person or companies designated by it, the intention being that the American Company, or its nominees, shall be the sole customer of the Imperial Company, and of Salmon & Gluckstein, Limited, in the United States, and that the Imperial Company, or its nominees, shall be the sole customer of the American Company, the Continental Company, and the Cigar Company, in the United Kingdom. None of the parties shall sell any tobacco products to any person, firm or company whom they have reason to believe will ex-

port the same to the territory in which the seller has agreed not to sell such goods as herein provided.

42 (19.) For American goods sold to the Imperial Company, or its nominees, for sale in the United Kingdom, in pursuance of the preceding clause, the Imperial Company shall pay the cost of manufacture and packing of such goods (but not including any expenses of advertising and selling) plus ten per cent. (10%) and shall also pay freight, customs charges and duties; and for goods of the Imperial Company, and of Salmon & Gluckstein, Limited, sold by them to the American Company, the Continental Company, or the Cigar Company, for sale within the United States, the American Company, the Continental Company, or the Cigar Company, as the case may be, shall pay the cost of the manufacture and packing thereof (but not including any expenses of advertising or selling) plus ten per cent. (10%), and shall also pay freight, customs charges and duties. In all cases of sales under this clause, the invoices of the respective vendors shall be final and binding as to cost. The Imperial Company shall be empowered by the American Company, and the Continental Company, to manufacture their brands within the United Kingdom, for sale therein, and the American Company, the Continental Company, and the Cigar Company, shall be empowered to manufacture the brands of the Imperial Company in the United States, for sale therein, and each party shall manufacture the brands of the other party upon recipes and formulae to be supplied by the other.

43 (20.) As nearly as practicable, and subject to existing contracts and obligations of the companies manufacturing and selling the cigars and cigarettes hereinafter referred to, the American Company, the Continental Company, and the Cigar Company will appoint, or procure the appointment of, the Imperial Company, sole agent for the sale, within the United Kingdom, of Havana and Porto Rico cigars, and Havana and Porto Rico cigarettes, directly or indirectly controlled by the American Company, the Continental Company and the Cigar Company, and such agency shall be upon the terms of the Imperial Company, receiving a net commission of seven and one half per cent. ( $7\frac{1}{2}\%$ ) upon the Havana and Porto Rico prices respectively, and being allowed three months' credit for payment of the invoice prices, less such  $7\frac{1}{2}\%$ , and the Havana and Porto Rico prices charged the Imperial Company shall, from time to time, and at all times, be as low as the prices charged by the American Company, the Continental Company, and the Cigar Company, or parties controlled by them, for similar cigars and cigarettes sold to their most favored customers, subject only to the exception that if, at any time, the prices of cigars or cigarettes sold to any country not affecting British trade, shall be temporarily reduced, for the purposes of competition, such local and temporary reduction is not to be taken into account for the purpose of fixing the price of cigars and cigarettes sold to the Imperial Company. If, and so far as the control of any other cigar trade not hereinbefore provided

for, is now possessed, or shall be acquired by the American Company, the Continental Company, and the Cigar Company, or any of them, a similar agency is to be given to the Imperial Company in respect thereof. The Imperial Company shall not (except to

complete any other contract already made) handle or sell  
 44 any other Havana or Porto Rico cigars and cigarettes than those of the American Company, the Continental Company, and the Cigar Company, for which the Imperial Company holds the aforesaid agency, and a similar provision shall apply to any other cigars or cigarettes for which the aforesaid agency may be hereafter granted, and the Imperial Company shall use its best efforts and endeavors to promote and enlarge the sales of all such cigars and cigarettes within the United Kingdom, and, provided the Imperial Company maintains a sale of the Havana cigars or cigarettes included in the agency hereinbefore provided for, equal to not less than seventy two per cent. (72%) of the total annual importations into the United Kingdom, duty paid, of cigars and cigarettes made in Cuba, the American Company, and the Cigar Company, and the Continental Company, shall not be entitled to call in question the efforts and endeavors of the Imperial Company hereinbefore required, provided, always, that the percentage to be maintained by the Imperial Company shall be ascertained upon the average of three years. The Imperial Company shall sell the cigars and cigarettes, from time to time falling within the said agency, at prices not exceeding their cost to the Imperial Company, with the addition of freights, railway charges, packages, customs duties and customs charges, and the said commission of  $7\frac{1}{2}$  per cent. The American Company, the Continental Company, and the Cigar Company, will not, knowingly, supply cigars or cigarettes to be transhipped or indirectly imported into the United Kingdom.

45 The aforesaid proportion of 72 per cent. has been based upon the belief and assumption that the parties hereto of the second part, third, fourth and fifth parts, or some or one of them, control, or will shortly control, not less than 80 per cent. of the aforesaid annual importations, and if it shall hereafter appear that the proportion thereof actually controlled by the said parties is less than 80 per cent., then, and in such case, the said proportion of 72 per cent. shall be correspondingly reduced.

(21.) The Imperial Company shall cause Salmon & Gluckstein, Limited, and A. I. Jones & Company, Limited, and any other companies, firms or persons, from time to time controlled by it (subject to the performance of any prior contracts) to purchase their cigars of any brands, comprised in the said agency, through the Imperial Company as agent under the last preceding clause.

(22.) The American Company, the Continental Company, the Cigar Company, and the Consolidated Company, together with their directors entering into the covenant aforesaid, are to give to the Imperial Company, in the United Kingdom, the full benefit of their good will and support; and, on the other hand, the Imperial Com-

pany, together with its directors, entering into the covenant aforesaid, are to give the American Company, the Continental Company, and the Cigar Company, in the United States, the full benefit of their good will and support, and, with a view to giving further  
46 effect to the intention of the parties, as in this clause hereinbefore expressed, the allottees of the said 1,500,000 ordinary shares of the Imperial Company are not to sell or transfer more than 10 per cent. of the said shares, within the period of five (5) years from the date of their allotment, if and so long as the present directors of the Imperial Company, or some of them, shall hold not less than 3,000,000 ordinary shares of the Imperial Company.

(23.) This agreement is to be construed and take effect as a contract made in England, and in accordance with the law of England, but to the intent that any of the parties may sue in its own country. The Imperial Company is always to have an agent for service in the United States, and each of them, the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, is always to have an agent for service in England, and service on any such agent of any notice, summons, order, judgment, or other process or document in respect of this agreement, or any matter arising thereout, shall be deemed to be good service on the party appointing such agent, and, as regards each of the said parties, whilst and whenever there is no other agent, the following shall be considered to be the agents of the respective parties duly appointed under this clause, namely:

For the Imperial Company, Samuel Untermyer, of New York city, American counsel, and for the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, Joseph Hood, 41 Castle street, Liverpool, solicitor.

47 Notice of any appointment under this clause shall be, from time to time, given by the appointer to the other parties hereto. The mode of service sanctioned by this clause is not, in any way, to prejudice or preclude any mode of service which would be allowable if this clause were omitted.

(24.) So far as it is necessary for the purpose of making the issue of ordinary shares hereinbefore mentioned, the Imperial Company shall forthwith take the necessary steps for increasing its capital, by the creation of an adequate number of ordinary shares (half preferred and half deferred) which shall rank *pari passu* with, and shall be of the same respective classes, and confer the same rights and privileges as, the 5,000,000 preferred ordinary shares, and the 5,000,000 deferred ordinary shares forming part of the original capital of the Imperial Company.

In witness whereof, the said parties of the first, second, sixth and seventh parts have hereunto affixed their common seals, and the said parties of the third, fourth and fifth parts have executed this

agreement under the hand of their respective presidents, the day and year first above written.

(THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, *LAND*, LIMITED.)

The common seal of the Imperial Company was hereunto affixed by order of the board in the presence of

GEORGE ALFRED WILLS,

C. E. LAMBERT,

Directors.

H. W. GUNN, Secretary.

48

(OGDEN'S LIMITED.)

The common seal of Ogden's Limited was hereunto affixed in the presence of

R. W. WALTERS,

JOHN MacCONNAL,

Directors.

(BRITISH TOBACCO COMPANY, LIMITED.)

The common seal of British Tobacco Company, Limited, was hereunto affixed in the presence of

R. W. WALTERS,

JOSEPH HOOD,

Directors.

(THE AMERICAN TOBACCO COMPANY.)

The common seal of the American Tobacco Company was hereunto affixed in the presence of

J. B. DUKE, Pres't.

(CONTINENTAL TOBACCO CO.),

By J. B. DUKE, Pres't.

Continental Tobacco Company has executed this agreement, under the hand of James Buchanan Duke, its president, in the presence of

JOSEPH HOOD,

Solicitor, Liverpool.

AMERICAN CIGAR CO.,

By J. B. COBB, Pres't.

American Cigar Company has executed this agreement under hand of John Blackwell Cobb, its president, in the presence of

W. R. HARRIS,

Director American Cigar Co.



CONSOLIDATED TOBACCO CO.,  
By J. B. DUKE, Pres't.

Consolidated Tobacco Company has executed this agreement under the hand of James Buchanan Duke, its president, in the presence of

W. R. HARRIS,  
Treasurer Consolidated Tobacco Co.

A true copy.

H. F. BARTLETT,  
Registrar of Joint Stock Companies.

Consulate-General of the United States of America for Great Britain and Ireland, at London.

I, Henry Clay Evans, consul-general of the United States of America for Great Britain and Ireland at London, do hereby  
49 make known and certify to all whom it may concern, that the signature "H. F. Bartlett," subscribed to the annexed certificate, is of the true and proper handwriting of H. F. Bartlett, registrar of joint stock companies, that the "companies registration office" in London has no official seal, and that to all acts signed as the annexed full faith and credit are and ought to be given in judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed the seal of the consulate-general of the United States at London, aforesaid, this 8th day of March, 1905.

H. CLAY EVANS,  
Consul General.

[SEAL.]

(Endorsed :) Circuit court of the United States, for the southern district of New York.—The United States of America, complainant, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants.—Presentment of grand jury.—Dated June 14th, 1905.—U. S. circuit court, southern district of New York, Filed Jun-14, 1905, John A. Shields, clerk.

50

"D."

UNITED STATES OF AMERICA,  
Southern District of New York, City and }  
County of New York.

To the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York.

SIR: The grand jury for the May term, 1905, respectfully represents to your honor and charges that William H. McAlister is guilty of contempt of court, in this:

Whereas, on the 13th day of June, 1905, a subpoena in due form was duly served upon the said William H. McAlister commanding him to appear before the said grand jury at a certain time named in the said subpoena, to-wit, on the 14th day of June, 1905, to testify and give evidence in a certain suit or proceeding then pending undetermined in the circuit court of the United States for the southern district of New York, before the grand jury thereof, between The United States of America, as complainant, and The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States of America, and to produce at the said time and place certain papers and documents, all of which are specifically enumerated and set forth in the said subpoena; and,

51 Whereas, the said William H. McAlister did appear before the said grand jury on the 14th day of June, 1905, in obedience to said subpoena, but did fail and refuse to produce before the said grand jury the aforesaid papers and documents; and the said papers and documents were then and now are material to a charge or complaint under investigation before the said grand jury in said suit or proceeding; and

Whereas, the said William H. McAlister did, on the said 14th day of June, 1905, further fail and refuse to answer certain questions pertinent to the said charge and complaint under investigation, as aforesaid, and material thereto, propounded to him by the said grand jury; and,

Whereas, the said grand jury did on the 14th day of June, 1905, duly present the foregoing facts to this honorable court, by a presentment in writing, duly signed by the said grand jury, by and through George E. Wood, Esq., its foreman, which presentment in writing was duly filed in the office of the clerk of this court on said 14th day of June, 1905, and to which presentment for greater particularity reference is hereby made, and the same is hereby made a part hereof in the same manner as if the same were here repeated at length; and

Whereas, your honor did on the said 14th day of June, 1905, duly consider the said presentment, and the said William H. Mc-  
52 Alister, being then present in open court, your honor did then and there make the following order, to wit:

"The witness is hereby directed to answer the questions as propounded by the grand jury and forthwith to produce before the grand jury the papers and documents called for in the subpoena.

"The grand jury may now withdraw, and the witness will attend before it forthwith."

That thereupon and in obedience to the said order, the said grand jury did thereupon withdraw to the grand jury room, together with the said William H. McAlister, and thereupon the said William H. McAlister was again asked the questions which are set forth in Exhibit B, attached to the said presentment, and which the said William H. McAlister had failed and refused to answer as aforesaid;

and the said William H. McAlister was further then and there asked to produce the papers and documents called for by the *sub-pœna duces tecum* served upon him, as aforesaid, and which papers and documents the said William H. McAlister had failed and refused to produce before the said grand jury, as set forth in the said presentment duly filed herein on the 14th day of June, 1905, as aforesaid; that the said William H. McAlister did then and there again fail and refuse to answer the said questions, and did then and there fail and refuse to produce the said papers and documents, which said questions the said William H. McAlister had been 53 directed by the court herein as aforesaid to answer and which said papers and documents the said William H. McAlister had been directed by the court herein as aforesaid to produce.

That a copy of the minutes of the proceedings before the grand jury held on the said 14th day of June, 1905, and at which the said William H. McAlister did again fail and refuse to answer the questions which he was directed by the court herein to answer, as aforesaid, and at which he failed and refused to produce the papers and documents which he was directed by the court herein to produce, is hereto annexed, the same being a true and correct transcript of the minutes of the said proceedings and of the whole thereof and marked "Schedule I," and made a part hereof.

That the said papers and documents were then and now are material to the investigation of the aforesaid complaint and charge being conducted before the said grand jury, and that the said questions propounded to the said William H. McAlister, as aforesaid, were and are pertinent to the said investigation and material thereto.

Wherefore, the said grand jury charges that the said William H. McAlister is in contempt of court, and asks that such proceedings may be had as in the premises are in accordance with law.

GEORGE E. WOOD, Foreman.

54

#### SCHEDULE 1.

Before the United States Grand Jury.

THE UNITED STATES OF AMERICA, Complainant,	}
against	
THE AMERICAN TOBACCO COMPANY and THE IMPERIAL TOBACCO Company (of Great Britain and Ireland), Limited, Defendants.	

NEW YORK, N. Y., June 14th, 1905.

Present: The grand jury, Mr. Taft, Mr. Levy.

The grand jury, and the counsel, and the witness William H. McAlister, repair to the rooms of the United States circuit court, and appear before Hon. E. Henry Lacombe, circuit judge.

The grand jury thereupon filed the presentment, dated June 14th, 1905, setting forth the failure and refusal of the witness McAlister

to answer the questions propounded to him before the grand jury, and to produce the papers and documents set forth in the subpoena served upon him. Judge Lacombe thereupon made the following order:

55     “The witness is hereby directed to answer the questions as propounded by the grand jury, and forthwith to produce, before the grand jury, the papers and documents called for in the subpoena.

“The grand jury may now withdraw, and the witness will attend before it forthwith.”

The grand jurors, the counsel for the Government, and the witness William H. McAlister, then returned to the grand jury room.

Examination of WILLIAM H. MCALISTER resumed.

By Mr. TAFT:

Q. You have been directed by Judge Lacombe, of the circuit court, to answer the questions which were propounded to you by me this morning, do you so understand?

A. Yes.

Q. You have also been directed by the court to produce the papers and documents enumerated in the subpoena served upon you in this matter, do you so understand?

A. Yes.

Q. I now ask you whether you will now answer the questions which were propounded to you by me this morning and which you then refused to answer?

A. I decline to answer, for the same reasons that I gave this morning.

Q. Do you decline to answer the said questions, for the same reasons given by you when you refused to answer the questions this morning, before you were directed by the court to answer the same?

A. Yes.

56     Q. Will you now produce before the grand jury the papers and documents called for in the subpoena served upon you and in pursuance of which you attended before the grand jury this morning?

A. No, for the same reasons that I declined to do so this morning, before going before Judge Lacombe.

Q. Do you decline to produce those papers and documents, for the same reasons given by you when you were asked to produce the same before the grand jury this morning?

A. Yes.

Q. Have you brought any of the papers mentioned in that subpoena?

A. I decline to answer, for the same reasons I gave before.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in to-

bacco, tobacco products, cigars and cigarettes, between this country and Great Britain or any of its colonies?

A. I decline to answer, for the reasons that I gave this morning.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco, tobacco products, cigars and cigarettes, between the several States of the United States?

A. I decline to answer for the reasons that I gave this morning.

Q. Where is the main office of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Where is its office in the city of New York?

A. I decline to answer, for the same reasons.

Q. Who are the officers of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Is the paper which I now show you (showing witness a paper, marked "Exhibit C," and annexed to the presentment heretofore filed by the grand jury, on June 14th, 1905), a copy of the agreement which was executed, in England, dated September 27th, 1902, between Ogden's, Limited, the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, British Tobacco Company, Limited, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited?

A. I decline to answer, for the reasons stated before.

Q. Is there an agreement, of which the said paper marked "Exhibit C," is a copy, now in force?

A. I decline to answer, for the reasons stated before.

58 (Endorsed :) Circuit court of the United States, for the southern district of New York.—The United States of America, complainant, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants.—Presentment of grand jury.—Dated June 14th, 1905.—U. S. circuit court, southern district New York, Filed Jun-14, 1905, John A. Shields, clerk.

59 At a stated term of the circuit court of the United States of America, in and for the southern district of New York in the second circuit, held at the United States court and post office building in the borough of Manhattan, in the city of New York on the 14th day of June, 1905.

Present: Hon. E. Henry Lecombe, circuit judge.

In the Matter of the Application of WILLIAM H. McALISTER for a Writ of *Habeas Corpus*.

On reading and filing the petition of the above named William H. McAlister, verified the 14th day of June, 1905, for a writ of *habeas*

*corpus*, directed to William Henkel, Esquire, United States marshal in and for the southern district of New York, requiring him to bring and have the petitioner before this court together with the true cause of his detention and restraint of the petitioner, to the end that this court may act thereupon as of right and according to law ought to be done, and it appearing from the said petition itself that the petitioner is not entitled to said writ: Now after hearing De Lancey Nicoll, Esquire, of counsel for the petitioner, in support of the said application, and due deliberation having been had, it is

Ordered that such application be, and the same hereby is, in all things denied.

Enter.

E. HENRY LACOMBE,  
United States Circuit Judge.

60 (Endorsed:) Circuit court of the United States, southern district of New York.—In the matter of the application of William H. McAlister, for a writ of *habeas corpus*.—Order denying application for writ of *habeas corpus*.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—Due service of the within order is hereby admitted this 14th day of June, 1905. Henry L. Burnett, U. S. att'y. William Henkel, U. S. marshal.—U. S. circuit court, southern district of New York, Filed Jun-14, 1905, John A. Shields, clerk.

61 Supreme Court of the United States.

In the Matter of the Application of WILLIAM H. MCALISTER for Writ of *Habeas Corpus*.

WILLIAM H. MCALISTER, Appellant,  
vs.

WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee. }

Know all men by these presents, that we, William H. McAlister, as principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars (\$1000) to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of June, 1905.

Whereas, lately, to wit, on the 14th day of June, 1905, at a circuit court of the United States in and for the southern district of New



York, in a proceeding therein pending a final order was entered denying the petitioner's application for a writ of *habeas corpus*; and,

Whereas, the said petitioner has duly obtained an appeal from the said order to the Supreme Court of the United States and  
62 has filed a copy thereof in the clerk's office of the said circuit court to review the same; and

Whereas the said court, good cause therefor being shown, has by order this day duly made and entered directed that the petitioner may be enlarged upon recognizance, with sufficient surety, in the sum of one thousand dollars (\$1000) for his appearance to answer the judgment of the said Supreme Court; now the condition of this recognizance is such, that if the said petitioner, William H. McAlister shall appear to answer the judgment of the Supreme Court upon the said appeal, then this recognizance shall be void, else to remain in full force and effect.

[SEAL.] WILLIAM H. McALISTER. [SEAL.]  
THE UNITED STATES FIDELITY &  
GUARANTY COMPANY,  
By W. C. SCHRYVER, Attorney in Fact.

Attest: ALONZO G. OAKLEY,  
Attorney in Fact.

Sworn to and acknowledged before me this 14th day of June, 1905.

[SEAL.] JOHN A. SHIELDS,  
U. S. Commissioner.

63 Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.

We Will Bond You.

(Cut.)

STATE OF NEW YORK, {  
County of New York, } ss:

Before me personally came Walter C. Schryner, known to me to be the att'y in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of William H. McAlister as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the att'y in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August

13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of William H. McAlister is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as att'y in fact of said company; and that he is acquainted with Alonzo G. Oakley and knows him to be attorney in fact of said company; and that the signature of said Alonzo G. Oakley subscribed to said bond is the genuine handwriting of said Alonzo G. Oakley and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000.00).

W. C. SCHRYNER.

64 Sworn to, acknowledged before me, and subscribed in my presence this 14th day of June, 1905.

[SEAL.]

JOHN A. SHIELDS,  
U. S. Commissioner, S. D. of N. Y.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—McAlister vs. Henkel, U. S. marshal.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district New York. Filed Jun-14, 1905. John A. Shields, clerk.

65 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of WILLIAM H. MCALISTER for a Writ of *Habeas Corpus*.

WILLIAM H. MCALISTER, Appellant,	}
vs.	
WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.	

SIRS: Please take notice that William H. McAlister, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 14th day



said petition and that he desires in good faith to submit these questions to the Supreme Court for their determination.

68 And your petitioner will ever pray.

NICOLL, ANABLE & LINDSAY,

Solicitors and Counsel for the Petitioner,

31 Nassau Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA, }  
Southern District of New York, } ss :

William H. McAlister, being duly sworn, says: That he is the petitioner above named and that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

WILLIAM H. McALLISTER.

Sworn to before me this 14th day of June, 1905.

JOHN A. SHIELDS,

U. S. Commissioner.

The foregoing petition for appeal is granted and the claim of the appellant therein made is allowed. Supersedeas bond fixed at two hundred and fifty dollars (\$250.00). And good cause therefor being shown, pending the said appeal the petition- may be enlarged upon recognizance, with sufficient surety in the sum of one thousand dollars (\$1,000.00), for his appearance to answer the judgment of the Supreme Court. Done in open court this 14th day of June, 1905.

E. HENRY LACOMBE,

United States Circuit Judge.

69 (Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of William H. McAlister, for writ of *habeas corpus*.—William H. McAlister, appellant, vs. William Henkel, marshal in and for the southern dist. of N. Y., appellee.—Petition for appeal & allowance thereof.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—Due service of the within petition is hereby admitted this 14th day of June, 1905. Henry L. Burnett, U. S. att'y.—William Henkel, U. S. marshal.—U. S. circuit court, southern district of New York, Filed Jun- 14, 1905, John A. Shields, clerk.

70 In the Supreme Court of the United States.

In the Matter of the Application of WILLIAM H. McALISTER for  
Writ of *Habeas Corpus*.

WILLIAM H. McALISTER, Appellant,

vs.

WILLIAM HENKEL, Marshal in and for the Southern District of  
New York, Appellee.

Now comes the petitioner, William H. McAlister, by Nicoll, Annable & Lindsay, his attorneys, in connection with his petition of appeal to the Supreme Court from the order of the circuit court of the United States in and for the southern district of New York, entered herein on the 14th day of June, 1905, denying his application for a writ of *habeas corpus* herein, and makes and files the following assignment of errors:

The court erred:

1. In denying the petitioner's application for a writ of *habeas corpus*.

2. In deciding that it appears from the petition itself that the petitioner is not entitled to the said writ.

3. In holding that the petitioner is lawfully held in custody under the commitment of the circuit court dated the — day of June, 1905, and referred to in the said petition.

4. In holding that the circuit court had jurisdiction under the Constitution and laws of the United States by reason of any of the matters or things contained and set forth in the present-

71 ments or reports of the grand jury referred to in the said petition, or either of them, to entertain any charge or charges of contempt against the petitioner, or to act or proceed in any manner in the premises.

5. In holding that at the time the petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was any "suit or proceeding" of any kind whatever depending in the circuit court or before the grand jury between the United States and The American Tobacco Company and The Imperial Tobacco Company, Limited, defendants, in which the petitioner could lawfully be required under said Constitution and laws to testify or give evidence before the grand jury.

6. In holding that the grand jury was in the exercise of its proper and legitimate authority in prosecuting the so-called "suit or proceeding" described in the said reports or presentments.

7. In holding that section 1 of the legislative, executive and judicial appropriation act approved February 25, 1903, gave the petitioner immunity from prosecution for or on account of transactions,

matters or things concerning which he was directed to testify and produce evidence before the grand jury.

8. In holding that the inquiry before the grand jury upon which the petitioner was required to testify and produce papers and documents under the circumstances set forth in the petition was a suit or proceeding, under the so-called Sherman act, being "An act to protect trade and commerce against unlawful restraint and monopolies" (26 Stat. 209), and the acts amendatory thereof and supplemental thereto and particularly the said act of February 25, 1903.

72 9. In holding that the petitioner was not privileged under the Constitution and laws of the United States and particularly by the fifth amendment to the Constitution to refuse to testify or produce evidence before the said grand jury upon the said inquiry when by so doing he might incriminate himself.

10. In holding that the order of the court directing the petitioner to testify and produce evidence before the grand jury was not, in effect, an attempt to compel the American Tobacco Company to bear witness against itself in a criminal case, in violation of the said fifth amendment.

11. In holding the rights and privileges of the American Tobacco Company under the said amendment would not have been violated by the petitioner's compulsory examination before the grand jury.

12. In holding that the said act of February 25, 1903, does not usurp and infringe upon the pardoning power exclusively vested in the President of the United States by the express terms of section 2 of article II of the Constitution of the United States.

13. In holding that the said act of February 25, 1903, does not infringe upon and set at naught the express provisions of article X of the amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people.

14. In holding that the said act of February 25, 1903, does not deprive the various States of the United States of the sovereign right and power reserved to them by the said article X to prosecute and punish persons concerned in transactions, matters and things which

73 violate their own laws, provided such persons testify or produce evidence documentary or otherwise, concerning such transactions, matters and things in proceedings, suits or prosecutions under the three acts mentioned in the said act of February 25, 1903.

15. In holding that the said act of February 25, 1903, does not impair the right of the various States of the United States under article X, aforesaid, to prosecute and punish offenders against their own peace and dignity.

16. In holding that the said act of February 25, 1903, by undertaking in effect to grant pardons to persons who have been concerned in transactions, matters or things violative of the laws of the various

States, provided such persons testify and produce evidence documentary or otherwise, concerning such transactions, matters or things in proceedings, suits or prosecutions under the statute therein mentioned, does not usurp the power expressly reserved to the States by article X, aforesaid, to grant or withhold pardons and to provide for and deal with the granting or withholding or granting therein in accordance with their own constitution and laws.

17. In holding that the said act of February 25, 1903, requires a person to testify or produce evidence in proceedings, suits or prosecutions under the three acts therein mentioned, notwithstanding such testimony or production may tend to criminate him.

18. In holding that the order of the circuit court directing the petitioner forthwith to produce the papers called for by the *subpoena duces tecum* was not made in violation of the petitioner's rights under the fourth amendment of the Constitution of the United States, providing that the right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

74 19. In holding that the said order was not in effect a warrant to search for and seize the papers mentioned in the *subpoena duces tecum*, and was not issued in violation of the said fourth amendment.

20. In holding, the papers mentioned in the said subpoena being the property of the American Tobacco Company and in the petitioner's custody solely, by reason of his official relations toward that company, that the compulsion of the said subpoena and of the order that he produce such papers thereunder would not, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation in violation of its rights under the said fourth amendment.

21. In holding that by refusing to comply with the requirements of the said subpoena and of the order of the circuit court that he produce the said papers thereunder, the petitioner was not protecting by lawful means the company's right under the said fourth amendment to be secure in its papers and effects against unreasonable searches and seizures.

22. In holding that the petitioner was under a legal obligation to enforce and obey the said order of June 14, 1905.

23. In holding that it was not the petitioner's duty as an officer and director of the said corporation to disobey the said subpoena and order.

24. In holding that the order of the circuit court of June 14th, 1905, adjudging the petitioner guilty of contempt and the commitment issued pursuant to the said order were not without legal right, authority or jurisdiction of any kind and were not utterly void and ineffectual and that the petitioner's detention and imprisonment thereunder was not in violation of the Constitution of the United States, and in violation of his rights, privileges and immunities thereunder.



75 By reason whereof the petitioner prays that the said order discharging the writ of *habeas corpus* herein and remanding the petitioner to the custody of the appellee be reversed and that he be dismissed and released from all further restraint in the premises.

WILLIAM H. McALISTER, Petitioner.

NICOLL, ANABLE & LINDSAY,  
Counsel for Petitioner.

Read the 14th day of June, 1905.

E. HENRY LACOMBE,  
United States Circuit Judge.

(Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of William H. McAlister for a writ of *habeas corpus*.—William H. McAlister, appellant, vs. William Henkel, marshal in and for the southern dist. of N. Y., appellee.—Assignment of errors.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—U. S. circuit court, southern district New York, Filed Jun-14, 1905. John A. Shields, clerk.

76 Supreme Court of the United States.

In the Matter of the Application of WILLIAM H. McALISTER for Writ of *Habeas Corpus*.

WILLIAM H. McALISTER, Appellant,  
vs.

WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.

Know all men by these presents that we, William H. McAlister as principal and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars (\$250.00) to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of June, 1905.

Whereas, lately, to wit, on the 14th day of June, 1905, at a circuit court of the United States in and for the southern district of New York, in a proceeding therein pending a final order was entered denying the petitioner's application for a writ of *habeas corpus*; and,

Whereas, the said petitioner has duly obtained an appeal from the said order to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the said circuit court to review the same,

Now the condition of the above obligation is such, that if the said petitioner, William H. McAlister shall prosecute said appeal to effect and shall answer all costs therefor, or failing to make the said appeal good, then the above obligation to be void, else to remain in full force and effect.

[SEAL.]

WILLIAM H. McALISTER. [SEAL.]  
THE UNITED STATES FIDELITY &  
GUARANTY COMPANY,

By W. C. SCHRYVER, Attorney in Fact.

Attest: ALONZO G. OAKLEY,  
Attorney in Fact.

Sworn to and acknowledged before me this 14th day of June, 1905.

[SEAL.]

JOHN A. SHIELDS.  
U. S. Commissioner.

78 Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.

We will Bond You.

(Cut.)

STATE OF NEW YORK, }  
County of New York, } ss:

Before me personally came Walter C. Schryner, known to me to be the att'y in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of William H. McAlister as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the att'y in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of William H. McAlister is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as att'y in fact of said company; and that he is acquainted with Alonzo

G. Oakley and knows him to be attorney in fact of said company; and that the signature of said Alonzo G. Oakley subscribed to said bond is the genuine handwriting of said Alonzo G. Oakley and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000.00).

W. C. SCHRYNER.

79 Sworn to, acknowledged before me, and subscribed in my presence this 14th day of June, 1905.

[SEAL.] JOHN A. SHIELDS,  
U. S. Commissioner, S. D. of N. Y.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—McAlister vs. Henkel, U. S. marshal.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district New York, Filed Jun-14, 1905, John A. Shields, clerk.

80 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States, in the second circuit, to Honorable Henry L. Burnett, United States attorney for the southern district of New York, and to William Henkel, United States marshal in and for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol in the city of Washington in the District of Columbia, on the 11th day of July, 1905, pursuant to a petition, allowance and notice of appeal filed in the clerk's office in the circuit court of the United States for the southern district of New York, wherein one William H. McAlister is the appellant and you, the said marshal are appellee, to show cause, if any there be, why the final order of the said circuit court in the said petition, allowance and notice of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above mentioned, this 14th day of June, 1905.

E. HENRY LACOMBE,  
United States Circuit Judge.

NICOLL, ANABLE & LINDSAY,  
Attorneys for Petitioner and Appellant.

(Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of William H. McAlister, for writ of *habeas corpus*.—William H. McAlister appellant, *vs.* William Henkel, marshal in and for the southern dist. of New York, appellee.—Citation.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau St. New York.—Due service of the within citation is hereby admitted this 14th day of June, 1905. Henry L. Burnett, U. S. att'y. William Henkel, U. S. marshal.—U. S. circuit court, southern district New York, Filed Jun-14, 1905, John A. Shields, clerk.

81 UNITED STATES OF AMERICA, }  
Southern District of New York, } ss :

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the application of William H. McAlister for writ of *habeas corpus*. William H. McAlister, appellant *vs.* William Henkel, marshal in and for the southern district of New York, appellee as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of July in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and thirtieth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, Clerk.

[Endorsed:] United States Supreme Court. William H. McAlister appellant *vs.* William Henkel, marshal in and for the southern district of New York appellee Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,843. S. New York C. C. U. S. Term No. 341. William H. McAlister, appellant, *vs.* William Henkel, United States marshal in and for the southern district of New York. Filed July 13th, 1905. File No. 19,843.